U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-&D- CORP.

DATE: FEB. 9, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of digital printing services, seeks to permanently employ the Beneficiary as a business development manager under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. We dismissed the appeal and denied a later motion to reopen. The matter is now before us on a second motion to reopen. The motion will be denied.

The Director concluded that the record did not establish the Beneficiary's qualifying experience for the offered position and the requested classification. Accordingly, on January 27, 2014, the Director denied the petition. On July 25, 2014, we dismissed the Petitioner's appeal, affirming the Director's decision.

In its prior motion, the Petitioner established the Beneficiary's possession of the qualifying experience for the offered position and the requested classification. However, in on our June 5, 2015, decision, we found that the record did not establish the Petitioner's continuing ability to pay the proffered wage or the *bona fides* of its job offer.[1]

The instant motion is properly filed, stating new facts supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2).

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

[1] We may deny a petition on valid grounds unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, an administrative agency on review retains all the powers it possessed in issuing the original decision).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The labor certification states the proffered wage of the offered position of business development manager as $156,998 per year. The petition's priority date is January 8, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The record contains copies of the Petitioner's federal income tax returns for 2013 and 2014. On motion, the Petitioner also submits a profit and loss statement for 2015. However, the record does not indicate that the financial statement is audited. The statement therefore cannot establish the Petitioner's ability to pay in 2015 pursuant to 8 C.F.R. § 204.5(g)(2). We will therefore consider the Petitioner's ability to pay only through 2014.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and wages paid, if any. If a petitioner's amounts of net income or net current assets are insufficient, we may also consider other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[2]

The instant record contains a copy of an IRS Form W-2, Wage and Tax Statement, indicating the Petitioner's payment of $62,733.46 to the Beneficiary in 2013. The record also contains copies of 2014 payroll records indicating the Petitioner's payment of $49,666 to the Beneficiary through October 15.

The amounts on the payroll records and Form W-2 do not equal or exceed the annual proffered wage of $156,998. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. However, we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the differences between the proffered wage and the amounts it paid the Beneficiary, or $94,264.54 in 2013 and $107,332 in 2014.

The Petitioner's tax returns reflect annual net income amounts of $43,251 in 2013 and $(134,074) in 2014.[3] Neither of these amounts equal or exceed the differences between the proffered wage and the amounts paid by the Petitioner to the Beneficiary in 2013 or 2014. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its net income.

The Petitioner's tax returns reflect annual net current assets amounts of $216,636 in 2013 and $(347,766) in 2014. The net current asset amount for 2013 exceeds the difference between the

[2] Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

[3] Numbers in parentheses reflect negative amounts.

proffered wage and the amount paid to the Beneficiary by the Petitioner. However, the net current asset amount for 2014 does not reflect the Petitioner's ability to pay the proffered wage.[4]

Thus, based on examinations of the wages paid to the Beneficiary by the Petitioner and its net income and net current assets amounts, the record does not demonstrate its ability to pay the proffered wage.

As previously indicated, we may consider other evidence of a petitioner's ability to pay a proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning gross annual income amounts of about $100,000 and employing four people on a full-time basis. However, during the year of the petition's filing, she relocated her business, causing her to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend business operations. Despite the setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established her ability to pay the proffered wage. The petitioner established herself as a fashion designer whose work had been featured in national magazines. The record identified her clients as the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also indicated the petitioner's frequent lectures at design and fashion shows throughout the United States and at California colleges and universities.

As in *Sonegawa*, we may consider evidence of the instant Petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years it has conducted business; the historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the Beneficiary will replace a current employee or outsourced service; and any other evidence of the Petitioner's ability to pay the proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2002 and its employment of five people at the time of the petition's filing in June 2013. Copies of the Petitioner's federal income tax returns indicate an increase in wages paid from 2012 to 2014.[5]

However, the Petitioner's tax returns reflect a decrease in revenues from 2012 to 2014. Also, unlike in *Sonegawa*, the record neither indicates the occurrence of any uncharacteristic business expenditures or losses, nor documents an outstanding reputation by the Petitioner in its industry.[6]

---

[4] As indicated in our June 5, 2015, decision, the Petitioner filed a petition for another beneficiary that remained pending from the instant petition's priority date of January 8, 2013 until August 29, 2014. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not demonstrate its ability to pay multiple beneficiaries whose petitions remained pending after the instant petition's priority date). However, the record on motion demonstrates that the Petitioner's payments to the other beneficiary exceeded his proffered wage in 2013 and 2014.

[5] In our June 5, 2015 decision, we found that the Petitioner's 2012 federal income tax return did not reflect any wages paid to employees. However, on motion, the Petitioner states that Statement 1 of IRS Form 1120, U.S. Corporation Income Tax Return, reflects $229,734 in wages paid as "payroll services & taxes."

[6] The Petitioner asserts that it incurred $188,094 in uncharacteristic expenses, including $63,925 in moving expenses, in 2015. However, as previously indicated, we are not considering the Petitioner's ability to pay in 2015 because it has not

The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service.

In addition, online government records indicate an outstanding federal tax lien of $239,697.18 filed against the Petitioner in 2012. *See* Fla. Dep't of State, Div. of Corps., at (accessed Jan. 19, 2016). Thus, the record does not establish the Petitioner's ability to pay the proffered wage pursuant to *Sonegawa*.

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm our most recent decision and deny the motion.

II. THE BONA FIDES OF THE JOB OFFER

An employer "desiring and intending" to employ a foreign national may file a petition on his or her behalf. INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F).

A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding a petition's denial where a petitioner did not intend to employ a beneficiary as a live-in-domestic worker pursuant to the accompanying labor certification). For labor certification purposes, the term "employment" means "[p]ermanent, full-time employment for an employer other than oneself." 20 C.F.R. § 656.3.

As indicated in our June 5, 2015, decision, the instant record did not establish the Petitioner's intention to employ the Beneficiary in the offered position of business development manager on a full-time basis as stated on the accompanying labor certification. Counsel initially stated the Petitioner's merger with another company with which it shared space and a trade name. The Petitioner clarified that the companies did not merge, but only "joined forces to expand markets and better serve customers." However, the record suggested that the Beneficiary would generate business for the other company as well as the Petitioner in the offered position.

On motion, the Petitioner submits evidence that the trade names of it and the other company are similar, but not identical. The record also shows that, as of October 1, 2015, the Petitioner no longer shares space with the other company. In addition, the Petitioner's director states that the Beneficiary will work only for the Petitioner in the offered position and that the Petitioner has no plans to acquire or merge with any other company.

---

submitted required evidence for that year pursuant to 8 C.F.R. § 204.5(g)(2). Moreover, many of the stated expenses – such as bad debt, debt interest, and automobile expenses – do not appear to be uncharacteristic, as the Petitioner's 2014 tax return states similar expenses.

Thus, the preponderance of the evidence establishes the Petitioner's intention to employ the Beneficiary in the offered position. We will therefore withdraw the contrary finding in our June 5, 2015, decision.

III. CONCLUSION

The record establishes the Petitioner's intention to employ the Beneficiary in the offered position. We will therefore withdraw our prior, contrary finding. However, the record does not demonstrate the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm our June 5, 2015, decision and deny the motion.

The motion will be denied for the reason stated above. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the required benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The motion is denied.

Cite as *Matter of D-&D- Corp.*, ID# 15012 (AAO Feb. 9, 2016)